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Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEPHEN DANIEL EDWARDS,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *California v. Green*, 399 U.S. 149, 163 n. 15 (1970), this Court held that the Constitution is not "necessarily violated" in a criminal case by "the admission of a witness' prior inconsistent statement for the truth of the matter asserted." At the same time, the Court left open the possibility that in some circumstances such an admission may be unconstitutional, stating that "we may agree that considerations of due process * * * might prevent conviction where a reliable evidentiary basis is totally lacking * * *." This case, in which the murder conviction of petitioner rests almost exclusively on prior inconsistent statements of witnesses who denied the truth of those statements at trial, presents the two related questions left open in *Green*:

1. Whether the Due Process Clause is violated by allowing substantive admission of a witness' prior inconsistent statement in a criminal case in the absence of independent evidence corroborating the reliability of the statement.

2. Whether the Due Process Clause is violated by sustaining a criminal conviction on the basis of a witness' prior inconsistent statement in the absence of independent evidence corroborating the reliability of the statement.

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PETITION FOR A WRIT OF CERTIORARI

Stephen Daniel Edwards respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland entered in this case on November 24, 1995.

OPINIONS BELOW

The November 24, 1995 opinion of the Court of Special Appeals of Maryland and the April 15, 1996 order of the Court of Appeals of Maryland denying Edwards' petition for certiorari are unreported and are reprinted in the attached appendix ("App.").

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Special

Appeals was entered on November 24, 1995. The order of the Court of Appeals of Maryland was entered on April 15, 1996. On July 5, 1996, Chief Justice Rehnquist granted petitioner's timely application for an extension of time to file his Petition for a Writ of Certiorari up to and including August 13, 1996.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall * * * deprive any person of life, liberty or property, without due process of law * * *.

STATEMENT OF THE CASE

A. Introduction

This case presents an important question of constitutional law left open by this Court in *California v. Green*, 399 U.S. 149 (1970): to what extent does the Due Process Clause require corroboration when the State attempts to prove a criminal case on the basis of prior inconsistent statements of witnesses who either recant or cannot remember those statements. This is an important and recurring issue in the lower courts, and one that has divided those courts.

Here the issue arises in a particularly compelling context. For here the courts of Maryland—contrary to nearly every other jurisdiction addressing the issue—held that Due Process requires *no* independent corroboration or demonstration of reliability to sustain a conviction on the basis of prior inconsistent statements. And the Maryland courts have reached this conclusion in a murder case where, as we will show, not only is the reliability of the prior inconsistent statements very much in doubt; but those prior statements all consist of claims that petitioner offered extrajudicial admissions of guilt—admissions the Court long ago held were sufficiently suspect that they must be independently corroborated. *Opper v. United States*, 348 U.S. 84 (1954).

Thus, as described below, this case concerns a shooting death and the State's pressuring of a group of young men into agreeing that one of their friends in the group had said to them that he committed the crime. The State gave one of these young men prosecutorial immunity in exchange for his inducing others in the group to agree on their story, and it threatened those others with prosecution and jail if they did not cooperate. The State's tactics were such that the trial judge repeatedly stated his concerns over them and over the effect the may have had on the resulting statements of the young men.

Yet, when at trial all but one of these young men recanted what they previously had been induced to say—and instead testified under oath that their friend had in fact *never* said he committed the offense— the judge permitted the State, over objection, to prove its case on the basis of the prior statements by reading long passages of grand jury testimony into evidence. And he permitted this notwithstanding that the grand jury testimony was completely the product of leading questions, was followed by no cross-examination, and occurred without the presence of counsel either for the witness or petitioner. As a result, the murder conviction and life sentence now before this Court rest on this prior inconsistent, recanted, uncorroborated testimony.

B. Statement of Facts

In the fall of 1993, petitioner Stephen Edwards was a 16-year-old high school student in Washington, D.C. (Tr. 63-64, Dec. 5, 1994).[1] On October 2, 1993, he returned to his old neighborhood on Maple Avenue in Takoma Park, Maryland to visit several of his childhood friends. (Tr. 66-67, Dec. 5, 1994).

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[1] Citations to the record give both the transcript page ("Tr.") and trial date.

During the afternoon, Edwards played basketball on the public courts located behind the Park Ritchie Apartments (Tr. 67, Dec. 5, 1994) and later joined in a game of dice with, among others, Charles Rogers. (Tr. 69-70, Dec. 5, 1994). Edwards won two or three dollars from Rogers in the game and asked him to pay the money that evening as Edwards needed it for a taxi ride home. Rogers agreed to pay as soon as he was able to get the correct change. (Tr. 86, Nov. 30, 1994; Tr. 89, Dec. 5, 1994).

During the evening, Edwards, Rogers, and a half-dozen others spent time together around the Park Ritchie Apartments and at a nearby deli, barbershop, and subshop. (Tr. 72-73, Dec. 5, 1994). Around midnight, several of the young men were gathered together in that area when they heard gunshots from a wooded area behind the Park Ritchie. Some of them later said Edwards was with them when the group heard the gunshots (Tr. 22-23, 51, Dec. 5, 1994); others said he was not there. (Tr. 52, 142, Nov. 30, 1994). Some said Pierre Wilson, one of the boys in the group and a suspect in the case, was not present (Tr. 308-309, Nov. 29, 1994; Tr. 22-23, 50, 80-81, Dec. 5, 1994); others said he was. (Tr. 47-48, 54, 142, 146, Nov. 30, 1994).

In any case, the body of Charles Rogers was found the next day behind the Park Ritchie. He had been shot several times with a .25 caliber gun. (Tr. 109-110, 164, Dec. 1, 1994; Tr. 11, 28, Dec. 2, 1994).

Petitioner was charged with first degree murder in connection with Rogers' death. His initial trial ended in a mistrial after the jury was improperly exposed to irrelevant and prejudicial evidence. He was convicted on December 6, 1994, following a six-day retrial, and was sentenced to life imprisonment.

The State's theory was that Edwards killed Rogers because Rogers owed Edwards two or three dollars. The State, however, was unable to offer *any* physical

evidence or direct trial testimony that tended to inculpate Edwards: (1) no eyewitnesses were produced; (2) the murder weapon was never recovered; (3) although Rogers' clothes were examined and all of Edwards clothes were seized from his house and examined, no evidence was found connecting Edwards to the crime; (4) although fingerprints were lifted from the crime scene, none matched Edwards'; and (5) although footprints were lifted from the crime scene, none matched Edwards' shoes, even though all Edwards' shoes were seized from his home and examined. Furthermore, Edwards himself has consistently denied any involvement in the shooting, and testified in his own defense at trial.

In the absence of any eyewitnesses or physical evidence, the State premised its entire case on the proposition that Edwards told several of the other group members that he had shot Rogers. But the evidence at trial made clear that the State had pressured these witnesses to implicate Edwards and had been helped in doing so by a suspect to whom the State gave immunity, Pierre Wilson. As a result, at trial all but one of these boys categorically denied that Edwards *ever* admitted to shooting Rogers. In fact, Wilson himself could not remember whether Edwards had made such an admission. And although Wilson's cousin, Alex Gordon, did testify to incriminating out-of-court statements by Edwards, it was not clear how much Gordon knew first-hand; neither was it clear whether Gordon actually heard Edwards say anything, nor was it clear how much Gordon was influenced by a desire to protect his cousin, Pierre Wilson; and in any case, it was clear that the State had no independent evidence corroborating what Gordon said.

Because the State's entire case thus turned on the proposition that Edwards made incriminating extra-judicial admissions, it is important to give a description

of the witnesses' testimony related to those alleged admissions.

1. THE STATE'S WITNESSES

a. Pierre Wilson

Pierre Wilson was himself initially a suspect in the shooting. He testified in the case only after he was offered immunity from prosecution for conspiracy to murder. He was given that immunity in exchange for helping build a case against Edwards. (Tr. 100, 106, Dec. 2, 1994). Nevertheless, although he was to be the State's "star" witness, at trial he gave neutral testimony regarding Edwards' involvement.

Thus, on direct examination by the State, Wilson testified that he received a telephone call from Stephen Edwards shortly after the shooting, but Wilson did not testify that Edwards admitted to the killing in that conversation. (Tr. 70, Dec. 2, 1994).

As a result, the State introduced two unsworn statements that Wilson had allegedly provided to the police. Those statements alleged that Edwards had specifically told Wilson in their telephone conversation that he had shot Rogers in the head, the back and the chest. Wilson, however, did *not* adopt those statements at trial. Instead, he testified that he could not remember the further substance of his conversation with Edwards. Nevertheless, over objection the statements were admitted as substantive evidence against Edwards. (Tr. 82-84, Dec. 2, 1994). And they were admitted notwithstanding that the autopsy report did not corroborate them. That report showed that Rogers was shot in the leg, shoulder, head, and neck, *not* the chest, back, and head. (Tr. 12, 17, 20, 26, Dec. 2, 1994).

By his own admission, Wilson made between eight and thirteen inconsistent statements to the police in writing or by tape-recorded transcription. Throughout these interviews, Wilson altered significant details in his

story before finally arriving at the *unsworn*, extrajudicial statements that were introduced in evidence. (Tr. 96, Dec. 2, 1994).

Although Wilson's evidence against Edwards was questionable, the evidence implicating Wilson himself in the shooting was considerable, as was the evidence showing his motive for inducing others to incriminate Edwards. Specifically, several of the boys testified that Wilson was not present when they heard the gunfire, and that they saw Wilson shortly thereafter running, with a bag in his hand, from the wooded area where the body was found. (Tr. 23-24, 50-51, 80-81, Dec. 5, 1994). In addition, several of the boys testified that Charles Rogers said, shortly before he disappeared, that he intended to buy some drugs from Pierre Wilson. (Tr. 21, 46, 76, Dec. 5, 1994). And in fact, according to the autopsy, drugs (cocaine) were found in Rogers' body. (Tr. 8, Dec. 2, 1994).

Furthermore, it was known among the group that Pierre Wilson was angry with Stephen Edwards, because Wilson suspected Edwards of sleeping with his girlfriend. In fact, Wilson had threatened Edwards with a hammer because of his suspicions. (Tr. 74-75, 85-86, Dec. 5, 1994). Moreover, the only one of the boys shown to have any knowledge or experience with firearms was Pierre Wilson: he had pistol training in the Army and was familiar with semi-automatics such as the .25 caliber that killed Rogers. (Tr. 130, Dec. 2, 1994). Finally, the *only* physical evidence from the crime scene connected with any of the young men implicated Pierre Wilson: a pack of Monarch cigarettes was found next to the body, the brand several boys said Wilson often smoked. (Tr. 134, Dec. 1, 1994; Tr. 13, Dec. 5, 1994).

b. Lonell Britt

Lonell Britt, 17 years old at the time of the incident, testified that he and Edwards were standing in front of a local deli at the time of the shooting. (Tr. 176, Nov. 29,

1994). Britt further testified that in subsequent conversations with Edwards, Edwards confirmed that he had nothing to do with the shootings, and did not know who the gunman was.

Over objection, the State introduced Britt's grand jury testimony, in which Britt stated that Edwards was angry at Rogers, and that Edwards had made an admission regarding the shooting. (Tr. 212-222, Nov. 29, 1994). This grand jury testimony was admitted as substantive evidence despite Britt's claim that the State threatened to incarcerate him unless he testified in a manner consistent with the State's theory of the case. (Tr. 202, Nov. 29, 1994).

Specifically, Britt testified that he understood "that I was going to get locked up if I didn't say what you [the Prosecutor] wanted me to say." (Tr. 202, Nov. 29, 1994). He also testified that he told the grand jury what the prosecutor wanted him to say "because I was scared. I didn't know what to say because I ain't never been through nothing like that before." (Tr. 204, Nov. 29, 1994). He furthermore testified that the prosecutor told him of statements the other witnesses had made and when he wouldn't tell the same story they did she yelled at him and told him he was lying. (Tr. 272-274, Nov. 29, 1994). Significantly, Britt completely disowned his grand jury testimony at trial, stating "I want to keep a innocent person from going to jail." (Tr. 290, Nov. 29, 1994). Also according to Britt, he was high on marijuana at the time of his grand jury testimony. (Tr. 314, Nov. 29, 1994).

Notwithstanding the circumstances under which Britt's grand jury testimony was obtained, over objection the court allowed it to be received substantively against Edwards at trial. (Tr. 206, Nov. 29, 1994). The court also permitted a tape of that prior testimony to be played for the jury—even though it was replete with leading questions, even though no counsel for Britt had been present, and even though no cross-examination had

occurred. (Tr. 337, Nov. 29, 1994). The court furthermore permitted the jury to take a transcript of that testimony into its deliberations on petitioner's guilt. (Tr. 331, 337-338, Nov. 29, 1994).

In the wake of this substantial impeachment, petitioner sought to introduce prior consistent statements made by Britt at the first trial. The court, however, refused to let petitioner show the jury the favorable testimony Britt had given at the first trial of this case, testimony that confirmed that Britt had been pressured to lie before the grand jury. (Tr. 300-301, Nov. 29, 1994).[2] And the court took that view notwithstanding that the inaccuracy of Britt's pressured grand jury testimony was indisputably demonstrated by other evidence of record. For example, Britt had testified before the grand jury that Edwards told him during a jail visit to keep quiet about the case, but certified jail records showed that Britt had never visited Edwards in jail. And, when confronted on cross-examination Britt admitted that he had lied about the visit. (Tr. 295-296, Nov. 29, 1994).

c. David Davis

David Davis, 15 years old at the time of the incident, unequivocally testified at trial that Edwards had told him that he had not killed Rogers. (Tr. 61, Nov. 30, 1994). Over objection, the State was then permitted to introduce grand jury testimony of Davis in which he said that Edwards appeared "angry" at one point when he

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[2] The Court took the same view with regard to the other witnesses, *i.e.*, the judge permitted the prosecutor to impeach the State's own witnesses by showing the entire detail of their previous *unfavorable* grand jury testimony or written statements, but with regard to their previous *favorable* testimony at the first trial, the judge would not permit the detail of that testimony to be received; instead, he allowed only the conclusory assertion that the prior testimony was consistent with the witnesses' current trial testimony. (Tr. 102, Nov. 30, 1994).

rejoined the group, that Charles Rogers and Edwards had a conversation in which Rogers said he did not have money to pay Edwards, and that Edwards and Rogers had walked off together. (Tr. 86, Nov. 30, 1994).

Yet Davis also testified that he said these things *not* because he knew them to be true, but because he had heard them from other people, because the prosecutor insisted that he say them, and because he knew he could correct it later. As Davis testified at trial, "It was like, it was like, like I would say something, right, like she asked me a question and then I gave her the answer, and then she asked me about a thousand more times, you know, until I, until I tell her what she want to hear. And you know, I was trying to get out of there, because she just kept asking me the same questions over and over again, right, so I just started saying *what I heard.*" (Tr. 105, Nov. 30, 1994; emphasis supplied). As he also testified in court, he didn't mind acceding to the demands of the police and the prosecutor, "cause I knew I was going to have to come back here anyway, so I'd just straighten it out when I came here." (Tr. 114, Nov. 30, 1994).

d. Ramon Wilson

Ramon Wilson, 17 years old at the time of the incident, was like Pierre Wilson, Lonell Britt, and David Davis in that he did not provide helpful testimony to the State when it called him at trial. So, again, the State introduced prior grand jury testimony over Edwards' continuing objection. (Tr. 162-163, Nov. 30, 1994). Before the grand jury, Ramon Wilson testified that Edwards admitted to shooting Rogers in the head, back, and chest.[3] (Tr. 161, Nov. 30, 1994).

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[3] This putative admission, not surprisingly, is the same as the statement that Pierre Wilson attributed to Edwards, and it too is inconsistent with the autopsy report. *See supra* at 61.

Wilson maintained that his trial testimony was the truth, and that he would have told the grand jury the truth but for the fact that the government arranged for Pierre Wilson to meet with him privately, just before he was called before the grand jury. In that meeting, according to Ramon Wilson, Pierre Wilson told Ramon Wilson how he should testify in order to avoid going to prison. Later, again according to Ramon Wilson, a state's attorney and a police officer joined the meeting and further pressured Wilson into providing testimony favorable to the State. (Tr. 178-179, 193, Nov. 30, 1994).

As Wilson testified at trial, "I'm saying this, though. Reason why, you know, reason why all this is there, because what, you know, the way you [the prosecutor] put the pressure on me to make me do that." (Tr. 152, Nov. 30, 1994). He furthermore testified that the prosecutor brought Pierre Wilson into the interrogation room so Pierre could "persuade" Ramon to tell Pierre's version of what happened, a version Ramon then repeated to the prosecutor while Pierre and police detectives remained in the room, with Pierre prompting when Ramon's version was not "right." (Tr. 178-179, 185, 190-193, Nov. 30, 1994). But the true version, Ramon testified at trial, was that Stephen Edwards "never admitted" shooting Charles Rogers. (Tr. 193, Nov. 30, 1994).

e. John Wims

Like the others described above, John Wims, 17 at the time of the incident, was called by the State but had no incriminating evidence to offer against Stephen Edwards. So once again, the State introduced a prior statement the witness gave while being interrogated by police detectives and the prosecutor. In that statement, Wims said Edwards was angry at Rogers, threatened to kill him, and admitted to shooting him in the back, head, and chest—again mimicking Pierre's story. (Tr. 240, 241, 243, 247, Nov. 30, 1994). And in this instance,

moreover, the statement was unsworn because the State chose not to take Wims before the grand jury at all.

Over Edwards' objection, Wims' prior unsworn statement was received substantively as proof that Edwards committed the crime. And this was so even though Wims said the statement was not true and that he gave it because he had been questioned for some 5-6 hours and "because I felt that I was under restraint, that I wouldn't be able to leave unless I told them what they wanted to hear." (Tr. 252, 257, Nov. 30, 1994).

f. Alex Gordon

The remaining State witness was Alex Gordon, Pierre Wilson's cousin. Gordon, 15 years old at the time of the incident, was the only witness the State called that it did not try to impeach. On the other hand, Gordon remembered very little information until he was "refreshed" by reading a statement he had allegedly given in police custody. (Tr. 160, Nov. 28, 1994). Upon being refreshed, Gordon said that Edwards had admitted to shooting Rogers, but Gordon was unclear about whether Edwards had expressly *stated* that he shot Rogers, or whether Gordon had simply seen Edwards acting as if he were firing a gun when talking with Ramon Wilson.[4] Gordon was also unclear about what part of his testimony was first hand knowledge, and

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[4] Q. Tell us who you heard him [Edwards] talking to.

A. Ray [Wilson].

Q. Did you hear what he said to Ray?

A. Yeah.

Q. What did he say to Ray?

A. It was—really he was showing Ray. * * *. It was like him and Ray was talking, and he was like, like he had a gun in his hand, and he was telling Ray how he shot Charles. (Tr. 147, Nov. 28, 1994).

what part was hearsay based on what Ramon Wilson told him. (Tr. 52-53, Nov. 29, 1994). But this much is clear: Alex Gordon talked repeatedly to his cousin, Pierre Wilson, *before* talking to the police and Alex was concerned that "they was trying to put it on Pierre." (Tr. 70, Nov. 29, 1994). And, in any event, the substance of what Gordon said was never corroborated by other reliable evidence.

2. THE DEFENSE'S WITNESSES

The defense called three significant witnesses—two other young men who were present at the time the shots were heard (Steven Francis and Ivan Diaz) and Stephen Edwards, the petitioner.

a. Steven Francis

Steven Francis, 16 years old at the time of the incident, was with the other witnesses on Maple Avenue on October 2, 1993. He testified that Stephen Edwards was with him when the gunshots were heard from behind the Park Ritchie, and that Pierre Wilson was not present. He also testified that Pierre Wilson came running up later from behind the Park Ritchie with a black bag. (Tr. 23-24, Dec. 5, 1994). This fact was confirmed by a security camera videotape that was taken at the apartment building and that was shown at trial by the State. (Tr. 65, Dec. 2, 1994). Francis also denied ever hearing Stephen Edwards admitting to shooting Charles Rogers, or hearing Edwards threaten Rogers over money. (Tr. 35, Dec. 5, 1994).

b. Ivan Diaz

Ivan Diaz was also in the Maple Avenue group, and was 15 years old at the time of the incident. He testified that Rogers "was talking about buying some weed from Pierre." (Tr. 46, Dec. 5, 1994). He also testified that Edwards asked for money from Rogers and they "exchanged a couple of dollars." (Tr. 48, Dec. 5,1994). Afterwards, Edwards remained with the group while

Rogers walked behind the apartments. (Tr. 49, Dec. 5, 1994). Ten minutes later, according to Diaz, the boys heard gunshots from behind the apartments. At the time, Diaz testified, Edwards "was right there, right beside me." (Tr. 51, Dec. 5, 1994). But Pierre Wilson was not there, and did not appear until "four or five minutes later" after the gunshots. (Tr. 50, Dec. 5, 1994). Moreover, with regard to the money Rogers owed Edwards, Diaz testified that Edwards had said to Rogers "What's up with the couple dollars you owe me," and that Edwards was "not angry" about it because "it was only a couple of dollars." (Tr. 56, 57, Dec. 5, 1994).

c. Stephen Edwards

Finally, Stephen Edwards testified on his own behalf. He verified that he was 16 years old in October 1993 and was 17 at the time of trial. He also verified that he won "$2 or $3" from Rogers in a dice game on October 2. (Tr. 70, Dec. 5, 1994). He explained that "Me and Pierre don't really get along" because of a "beef over his girlfriend." (Tr. 74, Dec. 5, 1994). He also testified about Pierre confronting him earlier with a "stonecutting hammer" because of their "beef." (Tr. 74-75, Dec. 5, 1994).

He further testified that on October 2 Rogers had "said he wanted to get some smoke from Pierre * * *." (Tr. 76, Dec. 5, 1994). And he testified that Rogers paid Edwards the money, walked off behind the apartments and, five or ten minutes later, he heard gunshots. (Tr. 79, Dec. 5, 1994). Later, he saw Pierre Wilson coming from the area, carrying a shoulder bag, and moving fast. (Tr. 80-81, Dec. 5, 1994). Finally, he testified that he never told anyone he had shot Rogers, and did not even know where he had been shot. (Tr. 84, Dec. 5, 1994).

C. The Lower Court Rulings

In the trial court, petitioner repeatedly objected on Due Process grounds to the State being permitted to rely on the prior inconsistent statements of its own witnesses to

prove its case, particularly given the coercive tactics used to obtain those statements, their lack of trustworthiness, and the lack of corroboration for the statements. (Tr. 7-9, Nov. 29, 1994). Alternatively, petitioner contended that even if the prior statements could be received as substantive proof, their lack of trustworthiness and lack of independent corroboration rendered them insufficient as a matter of Due Process to prove guilt beyond a reasonable doubt. (Tr. 8, Nov. 29, 1994).

The trial judge rejected both contentions, relying on a previous Maryland Court of Appeals decision, *Nance v. State*, 629 A.2d 633 (Md. 1993). In *Nance*, the court held that prior inconsistent statements of recanting or forgetful witnesses may be used as substantive proof of guilt in a criminal proceeding, provided the statements were given "in an atmosphere of formality impressing upon the declarant the need for accuracy," provided further they were memorialized in a way that would eliminate concerns about whether they were "actually made," and provided, finally, that the declarant was available for cross-examination at trial. When these three conditions are met, according to *Nance*, "due process of law is satisfied." *Id.* at 644.

Believing itself bound by *Nance*, the trial court therefore rejected petitioner's Due Process contentions —without considering the trustworthiness of the witnesses' former statements, without regard to the tactics of the State that had produced the statements, and notwithstanding the trial judge's reservations about those tactics. As the judge said, "I must admit that I had some difficulty with some of the testimony that was unrebutted [that] * * * a male detective had said allegedly to some of these young witnesses with respect to veiled or sometimes not so veiled references to possible prosecution of them * * *." (Tr. 45, Dec. 6, 1994). As he also said, "I was somewhat troubled by some of the testimony with respect to how at least one detective approached some of these people and the

impact that that may have had on what they said * * *." (Tr. 48, Dec. 6, 1994). Nevertheless, he permitted all the pressured statements of these young witnesses to be received against petitioner, and found them sufficient as a matter of Due Process to sustain the conviction against him. (Tr. 45-48, Jan. 19, 1995).

Petitioner appealed these rulings to the Court of Special Appeals of Maryland, arguing, as that court noted, that the prior statements were unreliable and must as a matter of Due Process "be scrutinized for trustworthiness." App. 11a. That court summarily rejected the contention, simply stating that "That is not the law in Maryland" and stating further that, because the minimal requirements of *Nance* were met, "due process of law is satisfied." App. 11a (quoting *Nance*, 629 A.2d at 644). Petitioner therefore raised the issue again in his petition for certiorari to the Court of Appeals of Maryland. On April 15, 1996, that court denied the petition without opinion.

REASONS FOR GRANTING THE WRIT

The Court should grant review in this case for three reasons. First, the Due Process requirements governing the use of prior inconsistent statements in criminal cases present a troubling and difficult issue, one that this Court expressly left open in *California v. Green*, and one that has subsequently divided the lower courts. Second, this difficult issue is an important and recurring one, and one whose resolution is essential to the fair, uniform administration of criminal justice. Third, because the prior inconsistent statements in this case form virtually the whole of the State's evidence, because those statements resulted from tactics by the State that were at the very least questionable, and because a murder conviction now rests on the prior statements, this is a compelling case for resolving the issue.

I. THE LOWER COURTS ARE IN CONFLICT CONCERNING THE DUE PROCESS REQUIREMENTS GOVERNING THE USE OF PRIOR INCONSISTENT STATEMENTS IN CRIMINAL CASES

In *California v. Green*, 399 U.S. 149, 163 n.15 (1970), this Court noted that its prior decision in *Bridges v. Wixon*, 326 U.S. 135 (1945), had "suggest[ed] the existence of a possible constitutional problem in admitting a witness' prior inconsistent statements as substantive evidence." While the Court said in *Green* that "we do not read *Bridges* as declaring that the constitution is *necessarily violated* by the admission "of such statements," the Court also said that "we may agree that considerations of due process * * * might prevent convictions where a reliable evidentiary basis is totally lacking * * *." 399 U.S. at 163 n.15 (emphasis supplied).

In the years following *Green*, the lower courts have addressed the two questions left open by that case: (1) in what circumstances in a criminal case does the admission of a prior inconsistent statement for the truth of the matter asserted offend Due Process? and (2) in what circumstances does a conviction resting largely (or exclusively) on such statements offend Due Process? Numerous lower courts have addressed these questions, developing conflicting criteria and reaching conflicting results.

A. Admissibility

One of the earliest and now leading cases addressing the admissibility question is the Fifth Circuit's decision in *United States v. Leslie*, 542 F.2d 285 (1976). Following the invitation of this Court in *Green*, the *Leslie* Court developed a five-factor test for determining when the receipt of a prior inconsistent statement comports with Due Process: (1) the defendant was available for cross-examination (2) the statement was

made shortly after the events related and was promptly transcribed (3) the declarant knowingly and *voluntarily* made the statement (4) the declarant admitted making the statement and (5) there was independent corroboration of the statement's reliability. *Id.* at 290-91. Significantly, the Seventh Circuit adopted the Fifth Circuit's five-factor guidelines in *Vogel v. Percy*, 691 F.2d 843 (1982), expressly stating that "the application of these guidelines will safeguard due process by 'prevent[ing] convictions where a reliable evidentiary basis is totally lacking.'" *Id.* at 847 (quoting *Green*, 399 U.S. at 163 n.15). The central requirement in these five guidelines, as a district court in the Seventh Circuit recently noted, is that "[m]ost importantly, there must be some corroboration of the reliability of the statement." *Stone-Bey v. Swihart*, 898 F. Supp. 1287, 1299 (N.D. Ind. 1995).

Plainly, the guidelines developed in the Fifth and Seventh Circuit are directly in conflict with those applied by the Maryland court in *Nance* and in this case. For unlike the Fifth and Seventh Circuits, Maryland has *no* requirement that the prior statements be voluntarily given and *no* requirement that there be any independent corroboration for the statements. As a result, the tests petitioner asked the courts to apply here to determine the reliability and trustworthiness of the statements were refused, even though those very tests have been held central to Due Process in the Fifth and Seventh Circuits.

B. Sufficiency

The lower courts are also divided on the Due Process requirements for the sufficiency of evidence in a criminal case that turns solely or primarily on prior inconsistent statements.

The leading lower court case addressing the issue is *United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979). In that case, the defendant was convicted based on two prior inconsistent statements admitted as substantive

evidence. In addressing the constitutionality of the conviction, the Sixth Circuit began, as did the Fifth and Seventh Circuits, with *Green*: "The opinion in *California v. Green* ended with a strong hint that such statements, though constitutionally admissible, nevertheless may not be sufficient, by themselves, to sustain a conviction." *Id.* at 118. The referenced "strong hint" came in the last footnote of *Green*.[5] There the Court remanded the case to the California Supreme Court to determine whether the conviction should be upheld even though certain prior inconsistent statements of the key witness had been properly received in evidence. This Court said that question was "not insubstantial," particularly since the "[c]onviction here rests almost entirely on the evidence in [the witness'] two prior statements * * *." 399 U.S. at 170 n.9.

Based on *Green*, the Sixth Circuit held that even assuming that prior inconsistent statements are admissible in a criminal case, they may be used *only* to corroborate, to fill in gaps, or to supply detail, but they may not form "the sole evidence of a central element of the crime charged." *Orrico*, 599 F.2d at 119.

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[5] The same "strong hint" appears in the legislative history accompanying the 1975 amendments to the Federal Rules of Evidence. Those amendments, in Rule 801, removed the hearsay bar to sworn, prior inconsistent statements being offered for the truth of the matter asserted. However, as the Senate Committee noted:

> It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. *Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.*

S. Rep. No. 1277, 93rd Cong. 2d Sess. at 16 n.21 (emphasis supplied).

By contrast, the Seventh Circuit has rejected the notion that prior inconsistent statements alone may never serve as the basis for a conviction. In *Ticey v. Peters*, 8 F.3d 498 (7th Cir. 1993), the majority of the court employed the *Vogel* five-factor test to determine whether prior inconsistent statements were sufficiently reliable to justify a conviction. In that case, the defendant was convicted based on a witness' prior statement to police identifying the defendant, even though the witness recanted that identification at trial. The court rejected the defendant's contention that the prior inconsistent statement was insufficiently reliable to "comport with the guarantees of due process." *Id.* at 501. Implicitly rejecting the Sixth Circuit's *per se* rule that a conviction may not be based solely on such statements, the *Ticey* court applied the *Vogel* admissibility guidelines in order to weigh the quality and sufficiency of the evidence.[6]

Several state courts follow the Sixth Circuit's *per se* *Orrico* rule. *See State v. Gommenginger*, 790 P.2d 455 (Mont. 1990) (unreliable extrajudicial statement cannot serve as basis for guilt); *State v. Webb*, 779 P.2d 1108 (Utah. 1989) (uncorroborated prior statement cannot support conviction); *Brower v. State*, 728 P.2d 645 (Alaska App. 1986) (uncorroborated grand jury testimony held insufficient); *State v. Moore*, 485 So.2d 1279 (Fla. 1986) (reliance on testimony introduced as prior inconsistent grand jury testimony violated Due Process).

Still other state courts, although not expressly adopting the five-pronged *Ticey* approach, have

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[6] In dissent, Judge Cudahy agreed that the five-factor *Vogel* rule should be used to determine the constitutional sufficiency of the evidence, but held that the guidelines were not met because the only corroboration for the prior inconsistent statement was another prior statement from the same witness. This, said Judge Cudahy, simply piles one unverified statement on another and is therefore not corroboration. 8 F.3d at 502.

followed a rule that turns on the reliability of the extrajudicial statement as the lodestar of the Due Process inquiry. *See State v. Mancine*, 590 A.2d 1107 (N.J. 1991) (prior inconsistent statements as the sole substantive evidence is sufficient to convict if reliable and defendant can cross-examine the declarant); *State v. Robar*, 601 A.2d 1376 (Vt. 1991) (reliable past recollection recorded and prior inconsistent statements sufficient to support conviction).

Other state courts have adopted a third approach. These courts have held that a conviction may be predicated on uncorroborated extrajudicial statements without *any* independent examination of the reliability of the statements. *See, e.g., Acosta v. State*, 417 A.2d 373 (Del. 1980) (special jury instruction cures problems associated with prior inconsistent statements). The Maryland courts followed that approach in this case. Rejecting Edwards' arguments, the Court of Special Appeals sustained Edwards' conviction without engaging in *any* analysis of the reliability, voluntariness, trustworthiness, or corroboration affecting the prior inconsistent statements upon which that conviction rests.

There is thus a clear and direct conflict in the lower courts concerning both the admissibility and sufficiency requirements imposed by the Due Process Clause on prior inconsistent statements in criminal trials. Indeed, had petitioner been tried in the Sixth Circuit, or in a state that follows the Sixth Circuit's approach, his conviction could not stand because there was no sufficiently reliable evidence corroborating the extrajudicial statements.[7] Had Edwards been tried in the Fifth or

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[7] The only evidence arguably corroborating the substance of the extrajudicial statements of the recanting witnesses was the testimony of Alex Gordon that he overheard Edwards make certain statements about the shooting. It is well-settled, however, that an accused's admissions of essential facts or elements of the crime cannot be the basis of a conviction without further corroborating

[Footnote continued]

Seventh Circuits, or in states following the lead of either of those circuits, the prior inconsistent statements at issue in this case would not have been received or, at the least, would have been subjected to far more rigorous scrutiny to determine their constitutional sufficiency.

II. THE NATURE OF THE DUE PROCESS LIMITATIONS ON THE USE OF PRIOR INCONSISTENT STATEMENTS PRESENTS QUESTIONS ESSENTIAL TO THE FAIR ADMINISTRATION OF CRIMINAL JUSTICE

The questions presented by this case are both important and recurring. For it is inevitable that statements gathered by police or prosecutors or given before grand juries will not always be reliable; it is also inevitable that witnesses will often recant those statements; and it was therefore inevitable that the circumstances presented in this case—witnesses departing from their prior statements—would be commonplace in the nation's criminal courts.

In fact, as the previously cited cases demonstrate, this situation is a constantly recurring one in those courts. It is respectfully submitted that the requirements of Due Process in those courts should not vary from jurisdiction to jurisdiction, as they plainly do now. The Court should therefore make those Due Process requirements uniform, just as it did with regard to the Confrontation Clause requirements in *Green* and just as it has done in other comparable circumstances. *See, e.g., Tome v. United* States, 115 S.Ct 696, 699 (1995) (certiorari granted to resolve important evidentiary question

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[Footnote continued]

evidence. *See Opper v. United States*, 348 U.S. at 89. Thus, it is doubtful that Gordon's testimony, by itself, could corroborate the otherwise insufficient extrajudicial statements of the other witnesses. And even if this were not so, Gordon's testimony was otherwise unreliable for the numerous reasons stated above.

concerning admissibility of prior consistent statements); *Stone v. Powell*, 428 U.S. 465, 469 (1976) (certiorari granted because "[t]he issue is of considerable importance to the administration of criminal justice"); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (certiorari granted to consider whether petitioner's trial was conducted in accord with principles of Due Process); *Rochin v. California*, 342 U.S. 165, 168 (1952) (certiorari granted "because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States").

III. THE PRESENT CASE IS A COMPELLING ONE FOR RESOLVING THE QUESTIONS PRESENTED

For several reasons, the present case is an especially compelling vehicle for addressing the questions left open in *Green* and for resolving the differences among the lower courts concerning those questions. First, this is a first-degree murder case in which a 16-year-old has been sentenced to life in prison on the basis of the prior inconsistent statements at issue. Second, those prior statements were made by young witnesses, all of whom told different stories at different times, and all of whom were put under pressure by the State and by the State's immunized witness. Third, the pressure tactics used by the State in producing the statements were at the very least questionable, as the trial judge himself recognized.

Fourth, by any fair measure the State's proof in this case is marginal at best, for it lacks any physical evidence, any eye-witness evidence, indeed, any *direct* evidence at all—virtually nothing other than the prior statements claiming that petitioner admitted culpability. Fifth, the Maryland courts' refusal to apply *any* requirements of reliability or corroboration to the prior inconsistent statements plainly puts that jurisdiction in a distinct minority and led it to uphold a conviction that

would likely have been overturned in most other jurisdictions.

And finally, the Maryland courts' refusal to require corroboration appears to be doubly wrong: for not only should Due Process require such corroboration for prior inconsistent statements in general, but it should particularly do so when the subject of those statements is alleged extrajudicial admissions of the accused, which, as noted, must *themselves* be corroborated under the Court's decision in *Opper v. United States*, 348 U.S. at 91 ("statements of the accused out of court that show essential elements of the crime * * * have the same possibilities for errors as confessions [and] * * * must be corroborated").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

STEPHEN DANIEL EDWARDS	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	Petition Docket No. 646
STATE OF MARYLAND	*	September Term, 1995 (No. 99, September Term 1995, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Date: April 15, 1996

/s/ Robert C. Murphy

Chief Judge

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 99

SEPTEMBER TERM, 1995

STEPHEN DANIEL EDWARDS,

v.

STATE OF MARYLAND,

Bloom,
Davis,
Harrell,

JJ.

Per Curiam

Filed: November 24, 1995

Appellant, Stephen Daniel Edwards, was convicted by a jury in the Circuit Court for Montgomery County of first degree murder, use of a handgun in the commission of a felony or crime of violence, and possession of a handgun. He was sentenced to life imprisonment for murder and to a consecutive five year term of imprisonment for the use of a handgun in the commission of murder. The conviction for possession of a handgun was merged for sentencing.

On appeal, he raises three issues:

I Did the trial court err in excluding from evidence the testimony of key prosecution witnesses at an earlier trial of the same offenses?

II Did the trial court err in admitting an extra-judicial statement?

III Did the trial court err in admitting into evidence unreliable grand jury testimony of key prosecution witnesses, or, alternatively, in failing to inquire into the reliability of the grand jury testimony prior to its admission?

Appellant, a sixteen-year old high school student, was a frequent visitor to a neighborhood in Takoma Park, where he socialized with a group known as "The Maple Avenue Crew." The young men of the Crew often hung out in an area consisting of a shopping strip, a wooded area, and two apartment buildings—the Park Ritchie and the Deauville. On 2 October 1993, appellant, whose nickname was "Hot Man," spent parts of the evening with the Crew.

Takoma Park police officer Baxter Rich lived in the Park Ritchie apartment building. At about 1:00 a.m. on 3 October 1993, he checked his mailbox and stopped to chat with the building's security guard. Suddenly, a group of approximately ten young men rushed frantically into the lobby. Recognizing them, Officer Rich asked what was going on, but they did not reply.

Within seconds, another group ran up. Appellant and Lonnell Britt were in this group. Officer Rich observed that appellant handed something to Britt, then ran into the woods with another youth. Britt stuck the object into his belt and "protected" it as he crossed the lobby. Officer Rich also noticed that appellant looked "really tense," with an expression of "shocked, wide-open eyes surprise."

Shortly afterwards, Officer Ernest Prevost arrived in response to a dispatch reporting gunshots in the area. He and Officer Rich went to Steven Francis's apartment, where the group had gone, but they were unable to obtain information. Other officers searched outside, but found nothing. It was not until about 10:00 a.m. that a neighbor found the body of Charles Rogers in the wooded area near the two apartment buildings. The body had gunshot wounds in the forehead, back of head, neck, right shoulder, and left thigh.

Police questioned the members of the Maple Avenue Crew, and several of the youths testified before the Grand Jury. On the basis of their statements and testimony, appellant was arrested and tried for the murder of Charles Rogers. At trial, several of the youths recanted those portions of their police statements and Grand Jury testimony that implicated appellant.

Appellant was convicted, but a motion for a new trial was granted. It is the retrial that generates the instant appeal. Thus, the record before us includes a number of contradictory statements and testimony by the various members of the Maple Avenue Crew.

In general, the statements and testimony are in accord that appellant and Rogers, who was not a member of the Crew, had a disagreement over payment of money won by appellant in a craps game. As the crew gathered at the shopping strip to socialize, appellant and Rogers walked off together, toward the woods.

Neither appellant nor Rogers was with the group when the youths heard a rapid succession of gunshots. Appellant arrived at the Park Ritchie after the rest of the Crew and left after returning a borrowed hat to Britt. He did not go to the Francis apartment.

Some of the youths saw appellant and appellant's brother from the window of the Francis apartment. They heard appellant yell that everything was all right. Within an hour, appellant called on the telephone. In their Grand Jury appearance, some of the witnesses testified that in that telephone conversation appellant admitted killing Rogers and described how he shot Rogers in the head, chest, and back. Those witnesses recanted that testimony at trial.

Several of the youths gave statements that, in the weeks following the killing, appellant claimed responsibility. Some, but not all of them, recanted that testimony at trial.

I

As appellant points out, the evidence in this case included the testimony and statements of individuals who were not consistent on the point of his culpability. Two of these witnesses, Lonnell Britt and David Davis, gave statements to the grand jury implicating appellant. At appellant's first trial, they repudiated those statements and gave testimony favorable to appellant.

During appellant's second trial, the one under consideration in this appeal, Britt and Davis also testified in appellant's favor. On cross-examination, appellant sought to question both of these witnesses to establish that "at a prior proceeding" their testimony was exculpatory.

The trial court permitted appellant to elicit that each man had testified in a prior proceeding and that the prior testimony was consistent with his testimony at trial. With regard to Britt, the trial court ruled:

> [I]f [the defendant] wanted to just elicit just a general question, frankly which I think has already been elicited and answered, but if you wanted to have this witness testify that at a prior proceeding in this date, in May whatever, he gave testimony that was just consistent with what he had given today, that I would permit that, but I wasn't going to permit you to go piece by piece through it ... I will let you do that, but I am not going to let you pick out each and every piece and go through it.

With regard to Davis, the court said:

> They can use prior inconsistent statements to impeach, but I am not going to let you go through piece by piece his prior testimony at the prior proceeding and show those parts that were consistent. But I will, obviously, let you ask him if his testimony at the earlier proceeding is, you know, essentially the same as his testimony was here today.

Appellant complains that the jury was deprived of the opportunity to consider all of the statements made by Britt and Davis and that the trial court erred in limiting his cross-examination to eliciting the fact that their testimonies were consistent. We disagree.

Trial judges are vested with broad discretion in the conduct of trials in areas such as the reception of evidence. *McCray v. State*, 305 Md. 126, 133 (1985). Once a party has "fairly and substantially exercised the right to cross-examine, the court, in its discretion and in the interests of judicial economy, may preclude further cross." McLain, *Maryland Evidence*, § 611.1, quoted in *Brogden v. State*, 102 Md. App. 423, 438 (1994).

Lonnell Britt's testimony at appellant's first trial spans two days and comprises over 200 pages of transcript. The transcript of David Davis's testimony at the first trial also exceeds 200 pages. By permitting appellant to elicit the fact that the testimony of those witnesses at the first trial was consistent with their testimony at the

second trial, the trial court avoided unnecessary repetition of testimony while allowing appellant to make his point to the jury. The scope of cross-examination lies within the sound discretion of the trial court and there was no abuse of that discretion in this case. *Robinson v. State*, 298 Md. 193, 201 (1983).

Appellant claims that the limitation upon cross-examination violates the principles of *Nance v. State*, 331 Md. 549 (1993). *Nance* is inapplicable to the instant case. *Nance* and the cases subsequently decided under *Nance* concern only prior inconsistent statements, not prior consistent statements. The law applicable to prior consistent statements, such as those at issue in the instant case, is found in Rule 5-802.1(b), which permits introduction of a

> statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive

and in Rule 5-616(c)(2), which allows rehabilitation by

> evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment.

We do not read these rules as precluding the exercise of discretion by trial courts in a situation such as the instant case, where the transcripts of the "statements" offered exceeded 400 pages. Appellant was permitted to present evidence of prior consistent statements by both Britt and Davis. The jury was told that those witnesses had previously given exculpatory testimony consistent with their testimony at trial.

Appellant provides an additional argument with regard to the testimony of Lonnell Britt. When appellant asked Britt if his previous testimony was "exactly" the same as that given at trial, the State's objection to the word "exactly" was sustained.

Therefore, appellant argues, the "degree of consistency" was called into question by the State, making it essential for the jury to know "precisely what the witness testified to at the first trial."

As noted above, the transcript of Britt's testimony at the first trial exceeds 200 pages. The trial court correctly recognized that the probative value to appellant arose from the fact that his testimony at both trials was consistent, not from whether it was verbatim:

> The purpose of [Rule 5-616(c)(2)] is to permit—I mean, assuming that we are into a rehabilitation situation here, which things get a little twisted around, but I certainly follow your logic in saying that we ought to look at the rationale of the rule no matter who started what or whose witness it was, and that where a witness has been impeached and the other side seeks to rehabilitate, anything that would really tend to rehabilitate, such as prior consistent statements, the Court may and where appropriate should allow.
>
> Here, the fact is that he recanted after he gave his Grand Jury testimony. Now, he can recant once, twice or three times. It doesn't do much to say that he is consistent in his recanting. If he had made a statement prior to his Grand Jury testimony that was consistent with what he is now saying, that would be very germane and I most certainly would permit that.
>
> To say that when we last attempted a trial of this case that he did the same thing that he is doing now, whether it be last week or last month or several months ago, has very, very little probative effect.
>
> While I said that in an abundance of caution I am going to allow you to bring that fact out and to show that at a prior proceeding under oath in court he testified consistently with the testimony he gave here today, you were permitted to bring that out, and because of no objection by the State, indeed you were permitted to go into several specific instances, I

> said we were not going to go back and take every single item of his testimony and say, did you say this consistent with this? [B]ecause there was no need to do that.

We agree with the trial court's assessments of relevance and judicial economy and find no abuse of discretion in the decision to limit cross-examination.

II

Approximately six weeks after Charles Rogers was killed, appellant's friend Harland (Pierre) Wilson was interviewed by police. He drafted a statement in his own handwriting and signed a typewritten account followed by questions and answers. The last question to Wilson was, "Is this statement true and correct to the best of your knowledge and belief." Wilson answered, "[C]orrect yes."

At trial, Wilson was questioned about a telephone conversation with appellant. His testimony was less incriminating than his statements to police, and the State asked him to look at the statements to refresh his recollection. Wilson claimed a lack of memory. The trial court overruled appellant's objection and permitted the State to ask Wilson if he had written or said the things contained in the statements. He admitted that he had.

On appeal, appellant contends that the trial court's ruing was erroneous because the State did not lay a sufficient foundation to qualify this evidence for the past recollection recorded exception to the hearsay rule, Rule 5-802.1(e):

> A statement that is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the

> witness's memory and reflects that knowledge correctly. If admitted, the statement may be read into evidence but the memorandum or record may not itself be received as an exhibit unless offered by an adverse party.

Appellant points to two sources of error. First, he asserts that the witness never claimed that he remembered some but not all of "the conversation." Assuming that "the conversation" refers to the telephone call between appellant and Wilson, we find that the testimony of the witness effectively established loss of memory.

At trial, Wilson testified:

> I was, like, "What's up?" Then I said, "Did you bust him?" He said, "Everything cool." He said, "Everything's cool." And I said, "You all right?" He said, "Yeah."

Wilson's handwritten statement read:

> I asked him did you bust him. He said "everything is cool" then I said where did you get him at. He said the head the back and the chest.

The typewritten account said:

> Hotman told me on the phone that he shot him in the head, chest and back.

Thus, the witness represented at trial that he remembered only some details of the conversation. The statements themselves showed that he had forgotten others.

Next, appellant argues that Wilson did not testify that he made the statements when the matter was fresh in his mind and accurately reflected the knowledge that he then possessed. Again, the record shows otherwise.

Harland Wilson testified that the date of his statements to police was approximately six weeks after the

shooting. In *Oken v. State*, 327 Md. 628, 672 (1992), *cert. denied* 113 S. Ct. 1312 (1993), the Court of Appeals committed questions of admissibility of past recollection recorded to the sound discretion of the trial court. It is not an abuse of discretion to decide that six weeks is sufficiently close in time for the matter to have been fresh in the witness's mind when he gave his statement to police.

Wilson also testified that he signed both the written statement and the typed one, and that he was given a chance to review the typed statement for accuracy. He answered positively that the typed statement was true and correct to the best of his knowledge and belief at the time it was prepared. This satisfies the requirement of Rule 5-802.1(e) that the statement reflect the witness's knowledge correctly.

Oken gives trial court's the discretion to admit a writing to refresh a witness's recollection without a foundation, depending upon the particular circumstances present in each case. *Oken, supra*, at 672. The trial court correctly exercised its discretion in determining that Wilson's statements were sufficient for that purpose.

Four of the State's witnesses implicated appellant in their grand jury testimony but changed their testimony at trial. Appellant asks us to find error in the admission into evidence of their grand jury testimony. He argues that grand jury testimony is unreliable and must be scrutinized carefully for trustworthiness.

That is not the law in Maryland. Where a "turncoat" witness is available at trial for cross-examination, as the these four were, grand jury testimony is admissible as substantive evidence. *Nance v. State, supra.* Far from being inherently unreliable, grand jury testimony contains numerous indicia of trustworthiness.

> The rationales underlying Fed. R. Evid. 801(d)(1)(A) are clear. The requirement of a formal context such

> as judicial hearing or grand jury proceeding assures that the declarant did indeed make the prior statement. There will be no doubt that it was accurately recorded and transcribed. The requirements of an oath and testimony given under penalty of perjury discourage lying, reminding the declarant of punishment by both supernatural and temporal powers. *See United States v. De Sisto*, 329 F.2d 929, 934 (2d Cir.), *cert. denied*, 377 U.S. 979, 84 S. Ct. 1885, 12 L. Ed. 2d 747 (1964). The formal setting, oath, and the reminder of perjury all convey to the declarant the dignity and seriousness of the proceeding, and the need to tell the truth. Congress's decision to abandon the requirement of contemporaneous cross-examination harmonized the rule with the consensus prevailing among commentators and jurists that was discussed above.
>
> In sum, a statement given before a grand jury is made in an atmosphere of formality impressing upon the declarant the need for accuracy; and it will be memorialized in a manner that eliminates concerns about whether the statement was actually made. *Com. v. Daye*, 393 Mass. 55, 469 N.E. 2d 483, 494 (1984). The declarant must also, of course, be present as a witness at trial to be tested by cross-examination in regard to the former grand jury appearance and its contents. When all of these conditions have been made, due process of law is satisfied. The grand jury testimony of Harris and McCormick in the instant case properly could have been considered by the jury as substantive evidence.

Nance, at 571.

All of these conditions were met at appellant's trial. The trial court properly admitted the witness's grand jury testimony as substantive evidence, subject to appellant's extensive cross-examination, thus leaving to the jury decisions as to credibility and weight of that evidence. *Binnie v. State*, 321 Md. 572 (1991).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

Supreme Court, U.S.
OCT 3 1996
OFFICE OF THE CLERK

(2)

No. 96-245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STEPHEN DANIEL EDWARDS,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the issue of whether the Due Process Clause is violated by allowing substantive admission of a witness' prior inconsistent statement in a criminal case in the absence of independent evidence corroborating the reliability of the statement properly before the Court?

2. Is the issue of whether the Due Process Clause is violated by sustaining a criminal conviction on the basis of a witness' prior inconsistent statement in the absence of independent evidence corroborating the reliability of the statement properly before the Court?

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BRIEF IN OPPOSITION

Respondent, State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner Stephen Daniel Edwards.

OPINIONS BELOW

The unreported opinion of the Court of Special Appeals of Maryland, *Stephen Daniel Edwards v. State of Maryland*, No. 99, September Term, 1995 (filed November 24, 1995), affirming the Petitioner's convictions, is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 2a-13a). The April 15, 1996 order of the Court of Appeals of Maryland denying Petitioner's petition for writ of certiorari is also reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 1a).

STATEMENT OF JURISDICTION

Petitioner has erroneously invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).[1] Jurisdiction of this Court is predicated on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provision is reproduced in the petition for writ of certiorari. (Pet. for Cert. 2). In

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[1] Section 1254(1) is applicable in cases where a party is asking for review by this Court of a judgment in a federal court of appeals.

addition, Maryland Rule 5-802.1 provides as follows:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement;

Maryland Rule 8-131(a), also pertinent to this case, provides:

> (a) Generally. -- The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decided any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

STATEMENT OF THE CASE

Petitioner Edwards was charged with the murder of Charles Rogers, use of a handgun in the commission of a crime of violence, and transporting a handgun. Edwards was tried by a jury in the Circuit Court for Montgomery County, Maryland from November 28 through December 6, 1994.

At trial, two witnesses, then members of the Takoma Park, Maryland, Police Department, testified that in the very early morning hours of October 3, 1993, they responded to a call from their dispatcher reporting shots fired in the vicinity of 7600 Maple Avenue. (T4. 63-66, 72-74).[2] After checking the area and finding nothing amiss, they departed. (T4. 67, 76-78). Takoma Park Police Officer Baxter Rich testified that at approximately 1:00 a.m. on October 3, 1993, he was in the lobby of his apartment building at 7600 Maple Avenue checking his mail when two different groups of neighborhood boys ran in. (T4. 18-24). Observing their appearance and behavior, Rich thought something was wrong but stated that none of the boys, most of whom he knew at least by sight, would talk to him. (T4. 24). A few seconds later a police car pulled up and Rich accompanied one of the officers to one of the apartments to see if anyone had information

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[2] Record references are as follows: "T1." refers to trial proceedings of November 28, 1994; "T2." to proceedings of November 29, 1994; "T3." to proceedings of November 30, 1994; "T4." to proceedings of December 1, 1994; "T5." to proceedings of December 2, 1994; "T6." to proceedings of December 5, 1994; and, "T7." to proceedings of December 6, 1994.

regarding a report of shots being fired. (T4. 29-31).

Later that morning, Emanuel Ave, who lived at 7520 Maple Avenue, discovered a body along a footpath between his apartment and a nearby woods. (T4. 87-88). He returned to his apartment building, informed the resident manager, and went to the police station located a short distance away. (T4. 89). The resident manager's husband testified that, in the early morning hours of October 3, 1993, he had heard five shots fired and called the police. (T4. 96-97). After he and his wife spoke with Mr. Ave, they walked up the path, saw the body, and called the police. (T4. 98-100). Officers responding to that location discovered the body of Charles Rogers. (T4. 108-09, 115-16, 124).

According to the Assistant Medical Examiner, Charles Rogers had sustained multiple gunshot wounds, including wounds to his forehead, the back of his head, his neck, right shoulder, and left thigh. (T5. 7-28). The forehead and neck wounds were likely from the same bullet, with the bullet entering and exiting the head and, in a downward trajectory, lodging finally in the chest area. (T5. 13-14, 16-21).

Alex Gordon, who lived with his mother in an apartment at the Park Ritchie at 7600 Maple Avenue, saw Edwards in front of a deli on Maple Avenue with a number of friends on the evening of October 2, 1993, at one point talking with Charles Rogers. (T1. 123-37). Edwards did not appear to be in a good mood. (T1. 135). At around midnight, Ray and Pierre Wilson and John Wims came to Gordon's apartment. (T1. 137). Gordon looked out the window and saw Edwards and his brother; later, Edwards telephoned the apartment and spoke with Ray Wilson. (T1. 139-43). Approximately two weeks after the

shooting, Gordon saw Edwards and heard him explain to several people how he had shot Rogers. (T1. 147). Gordon saw Edwards a second time and Edwards again explained to him and others how he had shot Rogers. (T1. 149-50). After reading a prior statement to refresh his recollection, (T1. 156-58), Gordon stated that Edwards said that he ran through the woods, shot Rogers in the head, chest, and back, and kept on shooting. (T1. 159-60).

Harold Wilson testified that, on the evening of October 2, 1993, he met with friends outside a deli on Maple Avenue sometime around midnight. (T2. 84-87). Edwards was there and appeared upset. (T2. 88). At one point, Edwards and Rogers were talking and then walked away from the group. (T2. 91-93). A short while later, Wilson heard four or five gunshots, and then saw Edwards coming from the direction of the woods near the Park Ritchie. (T2. 95-97).

Lonell Britt, David Davis, Ramon Wilson, and John Wims all testified to circumstances surrounding the shooting on October 2-3, 1993. (T2. 156-99; T3. 35-61, 132-51, 208-23). Each claimed to either not remember prior statements made to the police or the grand jury or to having been coerced in some fashion to make statements inculpating Edwards, including remarks by Edwards claiming responsibility for the shooting of Rogers over a money debt. (T2. 200-02; T3. 63-64, 151, 225-29). The earlier inconsistent statements were introduced into evidence through each of these witnesses. (T2. 254-64; T3. 64-90, 151-62, 230-48).

Harlan Wilson testified that at one time he socialized with friends on Maple Avenue, and that, on the night of October 2, 1993, while in front of a deli there, he heard gunshots. (T5. 50-52). Although Edwards and Rogers

were together ten or fifteen minutes before the shots were fired, at the time the shots were heard, neither Edwards nor Rogers was with the group. (T5. 53). While in his cousin, Alex Gordon's apartment, Wilson spoke with Edwards on the telephone. (T5. 70). When Wilson asked, "Did you bust him?", Edwards replied that "[e]verything's cool." (T5. 70). Later, Edwards told Wilson that "the gun" was gone. (T5. 72). After refreshing Wilson's recollection with a written statement he made in November 1993, Wilson testified that, when he spoke to Edwards on the telephone on October 3, 1993, Edwards said that he shot Rogers in the head, back, and chest. (T5. 84).

Defense witnesses denied that there was any reason for Edwards to shoot Rogers and indicated that Harlan Wilson was the shooter. (T6. 7-29, 42-55). Edwards testified in his own defense and denied shooting Rogers or telling anyone that he had shot Rogers. (T6. 63-85).

On December 6, 1994, the jury found Edwards guilty on all counts. On January 19, 1995, the trial court sentenced Edwards to incarceration for life plus five years.

Petitioner noted a timely appeal to the Court of Special Appeals of Maryland, which affirmed Edwards's convictions on November 24, 1995. The Court of Appeals of Maryland denied Edwards's petition for writ of certiorari on April 15, 1996.

REASONS FOR DENYING THE WRIT

I.

THE TWO QUESTIONS PRESENTED ARE NOT PROPERLY BEFORE THE COURT BECAUSE THEY WERE NOT PRESENTED IN THE STATE COURT PROCEEDINGS.

Edwards asks this Court to review on due process grounds a Maryland rule of evidence espoused in *Nance v. State*, 629 A.2d 633 (Md. 1993), and subsequently codified in Maryland Rule 5-802.1. However, contrary to Edwards's contentions, no due process argument was made throughout his state appellate proceedings and no argument ever made that the evidence was insufficient to sustain his convictions because of unreliable prior inconsistent statements.

To invoke the jurisdiction of this Court under Section 1257, a petitioner must have properly raised a substantial federal question in the state court proceedings. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Assuming a federal question has been properly framed, it is essential that it be presented in a timely and proper manner at the appropriate point in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). A federal claim cannot be considered by this Court unless it has been either raised in the state court or considered and resolved by the state court. *Hill v. California*, 401 U.S. 797, 805 (1971). When the highest state court fails or refuses to pass expressly upon a federal question, the party invoking this Court's

jurisdiction has a high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for lack of proper presentation. Thus, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."[3] *Street v. New York*, 394 U.S. 576, 582 (1969).

If reasonable state procedural requirements were not observed, this Court will decline to exercise jurisdiction where the highest state court expressly refuses to decide the federal question for this procedural reason. *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-63 (1936). The fact that the federal question was properly raised before the trial court may not be enough. The question must also be pursued on appeal to higher state courts and must be pursued in the manner and with the degree of specificity required by the state rules of practice. *Beck v. Washington*, 369 U.S. at 549-54. Thus each state may prescribe the jurisdiction of its appellate courts, and the state law and practice in this regard must be applied unless they serve as a pretense to avoid a federal constitutional issue or are applied in a manner that discriminates against the assertion of federal claims. *Nickel v. Cole*, 256 U.S. 222, 225 (1921).

At trial, Edwards's counsel objected to the admission of

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[3] In this case, the Maryland Court of Appeals, the highest state court, denied a petition for writ of certiorari with respect to an unreported decision by Maryland's intermediate appellate court.

various State witnesses' prior inconsistent grand jury testimony, referring to "constitutional rights of confrontation of witnesses, a violation of due process of law." (T2. 4-7). In overruling the objection, the trial court concluded that, pursuant to Maryland evidentiary rules, the jurors would hear, through cross-examination, any and all of the circumstances surrounding the making of the prior statements and the factors accounting for any inconsistencies at trial. (T2. 7-8, 21-22). In so holding, the trial court observed that grand jury testimony, by its very nature, "is one of the highest forms of reliability." (T2. 21). In his motions for judgment of acquittal at the conclusion of the State's case and after reception of all evidence, defense counsel never referred to the unreliability of the prior inconsistent statements or any constitutional issue. (T5. 158-60; T6. 122). In the Court of Special Appeals of Maryland, Edwards argued that the trial court erred in admitting into evidence unreliable grand jury testimony or, alternatively, in failing to inquire into the reliability of the grand jury testimony. (Apx. 1a-5a). Specifically, Edwards posited before Maryland's intermediate appellate court that prior grand jury testimony was not automatically admissible under *Nance*, but, as is the case under the residual hearsay exception, further indicia of reliability are a necessary predicate to admissibility.[4]

Relying on the holding of the Court of Appeals in

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[4] In making his argument, Edwards relied on federal cases addressing the admissibility of grand jury testimony where the witness is *not* available at trial, and the prior grand jury testimony was under consideration for admissibility pursuant to the federal residual hearsay exception.

Nance, the Court of Special Appeals disagreed with Edwards's contention that grand jury testimony was unreliable and necessitated further screening by a trial court. "Where a 'turncoat' witness is available for cross-examination, as these four [witnesses] were, grand jury testimony is admissible as substantive evidence." (Pet. for Cert. App. 11a). Accordingly, the Court of Special Appeals held that "[t]he trial court properly admitted the witness's grand jury testimony as substantive evidence, subject to appellant's extensive cross-examination thus leaving to the jury decisions as to credibility and weight of that evidence." (App. 13a).

Edwards's petition for writ of certiorari to the Court of Appeals of Maryland contained two questions, each addressing the contours of the *Nance* holding. One dealt with the admissibility of prior consistent statements and the other the admissibility of grand jury testimony. In the latter case, Edwards did nothing more than reiterate his argument that grand jury testimony "should be judged under the admissibility requirement applicable in the residual exception to the hearsay rule." (Apx. 6a-8a).

As this record makes abundantly clear, no Maryland appellate court was presented with either a due process or sufficiency of the evidence issue with respect to prior grand jury testimony. Accordingly, the questions Edwards attempts to place before the Court are not appropriate for this Court's review.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE MARYLAND APPELLATE COURT BASED ITS DECISION ON INDEPENDENT STATE GROUNDS.

Under the standard established by *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983), this Court will not review a state court judgment if it rests on an adequate and independent state ground. This Court has pointed out that it is especially important that state courts be left free and unfettered in interpreting their constitutions, as well as their rules of evidence. *Michigan v. Long*, 463 U.S. at 1041; *Arizona v. Evans*, 115 S. Ct. 1185, 1189-90 (1995); *California v. Green*, 399 U.S. 149, 171-72 (1970) (Burger, C.J., concurring), 185-86 (Harlan, J., concurring).

As discussed above, the decision of the Maryland Court of Special Appeals rested entirely on a reading of state evidentiary rules. Having never been presented with a constitutional argument, it did not base its decision on the federal constitution or federal law. Further, the Maryland appellate courts adhere to the rule that "[o]rdinarily, courts do not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which to dispose of the case, and do not decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Employment Security Administration v. Baltimore Lutheran High School Assoc.*, 436 A.2d 481, 484 n.2 (1981) (citing *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). Clearly, the holding in Edwards's case was decided on independent and adequate

state grounds that preclude review by this Court.

III.

THERE IS NO ISSUE "LEFT OPEN" BY THIS COURT'S HOLDING IN *CALIFORNIA V. GREEN* AND NO CONFLICT AMONG LOWER COURTS CONCERNING USE OF PRIOR INCONSISTENT GRAND JURY TESTIMONY.

Petitioner relies on language in *California v. Green* to create what is essentially a straw man that he then proceeds to attack. Reliance on *Green* is misplaced, as is reliance on any of the other cases cited in Edwards's petition for certiorari.

In *Green*, this Court addressed Confrontation Clause implications in the admission of prior inconsistent statements where the witness-declarant claimed not to remember making the earlier statement. The Court ultimately found no confrontation problem with California's decision to alter its evidentiary rules to admit inconsistent statements as substantive evidence. 399 U.S. at 158-61. As long as the declarant is available as a witness and subject to cross-examination, the Confrontation Clause is not violated. *Id.* The Court observed as follows:

> If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the

witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy--an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth.

Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and--in this case--one that is favorable to the defendant. We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement.

* * *

Similar reasons lead us to discount as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. . . . The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of

> the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story.
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> * * *
>
> It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position,' but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.

Id. at 158-61 (footnote omitted).

In distinguishing those cases where the Court held that the Confrontation Clause required exclusion of a prior statement, the Court noted that those cases involved absent declarants. *Id.* at 161-64. It was in this context that the Court referred obliquely in a footnote to instances where "due process apart from the Confrontation Clause might prevent convictions where a reliable evidentiary basis is totally lacking[.]" *Id.* at 163 n.15. This footnote reference in no way "left open" due process questions regarding the use of all prior inconsistent statements, as Petitioner

asserts.[5] The question explicitly undecided in *Green* concerned the effect of a declarant's lapse of memory on

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[5] In fact, due process concerns were dispensed with by then Chief Justice Burger in his concurring opinion wherein he stated:

> The California statute meets the tests of the Sixth and Fourteenth Amendments, and accordingly, the wisdom of the statute is properly left to the State of California; other jurisdictions will undoubtedly watch the experiment with interest. The circumstances of this case demonstrate again that neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States. Federal authority was never intended to be a "ramrod" to compel conformity to nonconstitutional standards.

Id. at 171-72 (Burger, C.J., concurring).

In a second concurring opinion, Justice Harlan, before discussing at some length the distinctions between the Confrontation Clause and cross-examination, stated:

> [E]ven were this conclusion deemed untenable as a matter of Sixth Amendment law, it is surely agreeable to Fourteenth Amendment "due process," which, in my view, is the constitutional framework in which state cases of this kind should be judged. For it could scarcely be suggested that the Fourteenth Amendment takes under its umbrella all common-law hearsay rules and their exceptions.

Id. at 174 (Harlan, J., concurring).

One authority reads the Court's footnote as "dispell[ing] any suggestion that the substantive use of prior statements would be an unconstitutional violation of due process." J. Weinstein & M. Berger, *Evidence*, § 801(d)(1)[01] at 133 (1996).

the right of confrontation, not any due process issue.[6]

The relevant question--whether prior grand jury testimony, inconsistent with a witness's trial testimony, is admissible as substantive evidence so that there could be sufficient evidence to support a conviction--has been answered in the affirmative by the federal courts and by a majority of state courts. Federal Rule of Evidence 801(d)(1)(A) permits the use of inconsistent grand jury testimony, in addition to other categories of inconsistent statements given under oath, when "[t]he declarant testifies at trial . . . and is subject to cross-examination concerning the statement." *United States v. Hemmer*, 729 F.2d 10, 17 (1st Cir.), *cert. denied*, 467 U.S. 1218 (1984); *United States v. Marchand*, 564 F.2d 983, 997-99 (2d Cir. 1977); *United States v. Grandison*, 780 F.2d 525, 531 (4th Cir. 1985), *vacated on other grounds*, 479 U.S. 1076 (1987); *United States v. Dominquez*, 573 F.2d 366, 367 (5th Cir. 1978); *United States v. Woods*, 613 F.2d 629, 637 (6th Cir.), *cert. denied*, 446 U.S. 920 (1980); *United States v. DiCaro*, 772 F.2d 1314, 1322 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); *United States v. Wilson*, 806 F.2d 171, 175-76 (8th Cir. 1986), *modified and remanded on other grounds*, 815 F.2d 52 (8th Cir. 1987); *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1274 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988).

The majority of states have adopted the federal rule, or

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[6] Any issue regarding the sufficiency of the evidence was likewise not left open, but merely referred to by the Court as an additional ground on which the California courts could dispose of the case. *California v. Green*, 399 U.S. 149, 170 (1970).

a more lenient version of it, through enactment of similar statutes or through common law. *E.g.*, *Van Hatten v. State*, 666 P.2d 1047, 1049-54 (Alaska Ct. App. 1983); *State v. Moran*, 728 P.2d 248, 250 (Ariz. 1986); *Moore v. State*, 452 So. 2d 559, 562 (Fla. 1984); *People v. Coleman*, 543 N.E.2d 555, 560-61 (Ill. App. 1989); *Commonwealth v. Daye*, 469 N.E.2d 483, 490-96 (Mass. 1984); *State v. Charlo*, 735 P.2d 278, 279-81 (Mont. 1987); *State v. Skionsby*, 319 N.W.2d 764, 791-92 (N.D. 1982); *Dorsey v. State*, 620 P.2d 1261, 1262 (Nev. 1980); *State v. Jackson*, 348 N.W.2d 876, 878-79 (Neb. 1984); *State v. Hacker*, 427 A.2d 109, 111-13 (N.J. 1981); *State v. Maestes*, 584 P.2d 182, 190-92 (N.M. Ct. App. 1978); *Commonwealth v. Hayes*, 596 A.2d 874, 875-76 (Pa. Super. 1991); *State v. Calamity*, 735 P.2d 39, 42 (Utah 1987); *State v. Miller*, 502 A.2d 832, 836 (Vt. 1985); *State v. Smith*, 651 P.2d 207, 209-10 (Wash. 1982)(en banc); *State v. Horenberger*, 349 N.W.2d 692, 697 (Wis. 1984).[7]

The Maryland Court of Appeals first addressed the issue of prior inconsistent statements in *Nance* when it considered several trial witnesses' extrajudicial identifications, signed statements to the police, and grand jury testimony, which the witnesses later repudiated in one

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[7] In the Court of Appeals' decision in *Nance*, the court observed that sixteen states adhered to the "modern rule," by which prior inconsistent statements are admissible as substantive evidence provided the declarant is available at trial and subject to cross-examination, and that an additional twenty states have adopted the federal rule. 629 A.2d at 641, 643. For a thorough review of state statutes and case law relative to prior inconsistent statements, *see* J. Weinstein & M. Berger, *Evidence*, § 801(d)(1)(A)[09] at 165-83.

form or another at trial. The court affirmed the long-accepted evidentiary rule allowing a prior extrajudicial identification to be admitted through the testimony of a third party if the eyewitness is present at trial and subject to cross-examination. 629 A.2d at 639. Finding ample authority to support the admissibility of recanted extrajudicial identifications, the court held that such identifications were, likewise, admissible under Maryland law. *Id.* at 639-40.

The Court of Appeals then considered prior inconsistent statements as a whole and ultimately chose to align Maryland with those states that have selected an intermediate posture in regard to admissibility. Rather than maintaining the orthodox rule barring the admission of prior inconsistent statements as substantive evidence or adopting the modern rule permitting the use of such statements as substantive evidence when the declarant testifies and is subject to cross-examination, the Court of Appeals adopted a middle position. *Id.* at 641-43. It held "that the factual portion of an inconsistent out-of-court statement is sufficiently trustworthy to be offered as substantive evidence of guilt when the statement is based on the declarant's own knowledge of the facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at the trial where the prior statement is introduced." *Id.* at 643.

And, finally, the Court of Appeals found adequate indicia of reliability in statements made before a grand jury to permit their use as substantive evidence. *Id.* at 643-44. Again, the declarant must be a witness at trial and

subject to cross-examination. *Id.* at 644.[8] In doing so, the Court of Appeals stated as follows:

> The rationales underlying Fed.R.Evid. 801(d)(1)(A) are clear. The requirement of a formal context such as a judicial hearing or grand jury proceeding assures that the declarant did indeed make the prior statement. There will be no doubt that it was accurately recorded and transcribed. The requirements of an oath and testimony given under penalty of perjury discourage lying, reminding the declarant of punishment by both supernatural and temporal powers. The formal setting, oath, and the reminder of perjury all convey to the declarant the dignity and seriousness of the proceeding, and the need to tell the truth. Congress's decision to abandon the requirement of contemporaneous cross-examination harmonized the rule with the consensus prevailing among commentators and jurists that was discussed above.
>
> In sum, a statement given before a grand jury is made in an atmosphere of formality impressing upon the declarant the need for accuracy; and it will be memorialized in a manner that eliminates concerns about whether the statement was actually made. The declarant must also, of course, be present as a witness at trial to be tested

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[8] Maryland Rule 5-802.1(a) added, as a third category of prior inconsistent statement admissible as substantive evidence, one which is "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement".

> by cross-examination in regard to the former grand jury appearance and its contents. When all of these conditions have been met, due process of law is satisfied.

Id

The Court of Special Appeals of Maryland applied this holding to prior grand jury testimony of several recalcitrant witnesses at Edwards's trial. Those federal and state cases relied on by Petitioner to attack his self-generated strawman are inapposite to the issue decided by the Maryland intermediate appellate court. *United States v. Leslie*, 542 F.2d 285, 289 (5th Cir. 1976), concerns determinations of reliability in evidence--not grand jury testimony--being offered under the federal residual hearsay exception. Its applicability is, therefore, severely limited.

United States v. Orrico, 599 F.2d 113 (6th Cir. 1979), and the remainder of cases cited in Edwards's petition, address the sufficiency of the evidence when prior inconsistent statements are part of the prosecution's evidence. As stated previously, Edwards never raised a claim on appeal regarding the sufficiency of the evidence on any basis, much less on the basis of prior inconsistent grand jury testimony, thus precluding this Court's review of the sufficiency issue.

In any event, five of the seven cases cited by Edwards on the evidentiary sufficiency issue concern prior inconsistent statements other than grand jury testimony. *See United States v. Orrico*, 599 F.2d at 116-19 (only evidence of defendant's involvement was one sentence in statement taken one year after commission of crime and admitted as prior recollection recorded barely meeting minimal requirements of exception); *State v.*

Gommenginger, 790 P.2d 455, 463 (Mont. 1990) (only substantive evidence consisting of co-conspirator statement to informant); *State v. Webb*, 779 P.2d 1108, 1109-16 (Utah 1989) (hearsay was statement of unavailable 18-month-old sex abuse victim admitted erroneously through testimony by mother); *State v. Mancine*, 590 A.2d 1107, 1117 (N.J. 1991) (recanted prior inconsistent statement to police admissible if "generally corroborated and its reliability is supported by the circumstances under which it is given."); *State v. Robar*, 601 A.2d 1376, 1377-81 (Vt. 1991) (unreliable inquest testimony admitted as past recollection recorded and given six months after event with only perfunctory cross-examination at trial insufficient to establish guilt). The remaining two cases addressing grand jury testimony are readily distinguishable. *See Brower v. State*, 728 P.2d 645, 647-48 (Alaska App. 1986) (single live-in, victim-witness's brief recanted grand jury testimony insufficient to support conviction of attempted second degree sexual assault); *State v. Moore*, 485 So. 2d 1279, 1280-82 (Fla. 1986) (State acknowledges that only substantive evidence of guilt consisted of recanted grand jury testimony).

Unlike any of these cases, at Edwards's trial, some of the seven State witnesses present at the time of the underlying events testified consistently with their prior incriminating statements to the police and the grand jury, while others simply equivocated in some respects, while remaining consistent in others. Defense counsel was given, and took, the opportunity to cross-examine each of the witnesses who had testified inconsistently before the grand jury, and to point out circumstances which he believed would call into question the reliability of the testimony. (T2. 42-45, 292-98, 314-15; T3. 193, 257; T5.

95-117). These circumstances included alleged promises of immunity, fear on the part of the witnesses, or allegedly coercive efforts by the police or prosecutors. With all of this evidence before it, it was then entirely up to the jury to decided what to believe and what to disbelieve.

Petitioner is simply wrong when he asserts that the Maryland courts, including the Court of Special Appeals here, do not adhere to an approach to prior inconsistent statements that ignores any issue of reliability. (Pet. for Cert. 21). To the contrary, the Maryland Rule of Evidence with respect to prior inconsistent grand jury testimony, adopted subsequent to *Nance*, is that there are normally sufficient indicia of reliability in the grand jury process to ensure reliability. With the declarant available as a witness at trial and subject to cross-examination, the circumstances surrounding the earlier testimony and those affecting present trial testimony are placed before the factfinder. This approach is held by the overwhelming majority of lower federal and state courts, subject to extremely limited exceptions on a case-by-case basis.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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October 3, 1996

APPENDICES

APPENDIX A

[Excerpt from Appellant's Brief in *Stephen Daniel Edwards v. State of Maryland*, No. 99, September Term, 1995 (filed November 24, 1995)]

* * *

In sum, the Wilson link in this highly prejudicial hearsay chain did not fall within any exception to the general prohibition upon such evidence. The trial court's ruling was accordingly erroneous.

III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE UNRELIABLE GRAND JURY TESTIMONY OF KEY PROSECUTION WITNESSES OR, ALTERATIVELY, IN FAILING TO INQUIRE INTO THE RELIABILITY OF THE GRAND JURY TESTIMONY PRIOR TO ITS ADMISSION.

As noted in the Statement of Facts, defense counsel sought and was granted a series of continuing objections to admission of the grand jury testimony of key prosecution witnesses who inculpated Appellant before the grand jury, but exculpated him at trial.

Moving for a new trial, defense counsel reiterated and expanded upon his objections. It was the defense position (T. 1/19/95, 13 *seq.*) that the Court of Appeals in *Nance* based its analysis of the admissibility of grand jury testimony upon federal law (*see* 331 Md. at 569-571); that

under federal law grand jury testimony is not automatically inadmissible, but must instead be tested for reliability; and that the grand jury testimony in the present case was not obtained under reliable circumstances. Thus, for example, Lonell Britt testified that he was constantly under the influence of marijuana, including at the time of the grand jury testimony, and Pierre Wilson testified that he had been offered immunity. Further, Ray Wilson provided information favorable to the defense until the State arranged for Pierre Wilson to speak to him at great length in semi-custodial circumstances. Thereafter, Ray Wilson suddenly and suspiciously changed his story.

Appellant in moving for a new trial filed a detailed memorandum setting forth the applicable law. That memorandum provided the following arguments, which Appellant now reiterates:

Since the Court has in effect adopted the Federal Rule, it must be pointed out that the Federal Rule encompasses not only the rule cited in *Nance*, but also Federal Rule 804(b)(5), which applies when the declarant is unavailable to testify at trial. First of all, it must be pointed out that the Federal Courts in *United States v. Dent*, 984 F.2d 1453, 1462 (7th Cir. 1993), has already stated that:

> "We have already held that Grand Jury testimony (when the declarant is unavailable for cross-examination at trial) does not come within one of the specific hearsay exceptions in Rule 804; namely, the former testimony exception of Rule 804(b)(1) and is properly considered under the residual hearsay exception."

The Court then went onto say that such Grand Jury testimony is admissible under the residual hearsay exception only if it meets the stringent criteria of Rule

804(b)(4). The court also held that it must be evaluated under the Sixth Amendment Confrontation Clause and there must be a showing of "particularized guarantees of trustworthiness" to satisfy the Confrontation Clause, citing *Ohio v. Roberts*, 448 U.S. 56 (1980). This must be drawn from the totality of the circumstances. Such careful scrutiny of grand jury testimony under Rule 804(b)(5) demonstrates the Court's concerns about admitting such evidence. The federal courts have indicated that the court should view very carefully the facts and circumstances surrounding the taking of grand jury testimony, as to whether or not it meets the requirements of trustworthiness and reliability.

In *United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989), the court stated that only extraordinarily trustworthy grand jury testimony can be admissible under the residual exception of the hearsay rule as proof of the matter asserted. Although there is no per se rule, the court should look at all of the facts and circumstances. One fact that all courts seem to stress is whether or not the witness was granted immunity. In *Fernandez*, the general credibility assessment of the witness was questioned, not only in view of the fact that he was immunized, but also because he admitted to being under the influence of medications during his grand jury appearance. In the present case, as noted above, similar indicia of unreliability were present.

In analyzing circumstances showing the unreliability of grand jury testimony, the First Circuit has looked at whether the witness was testifying under immunity or the extrinsic evidence undermined her vision of the relevant facts. *United States v. Donlon*, 909 F.2d 650, 654 (1st Cir. 1990). At the trial of the instant case, the State introduced

the grand jury testimony of Lonnell Britt three times -- it was read by the Assistant State's Attorney, the tape of the grand jury testimony was played, and the jury was given a transcript in order to read along. Britt told the grand jury that Appellant had confessed to the shooting when Britt visited him in jail, an assertion which he recanted at trial and which was disproved by extrinsic evidence of the visitor's log at the jail, showing that Lonnell Britt never visited Appellant.

Accordingly, inherent in the law adopted by the Court of Appeals is a requirement that grand jury testimony be particularly trustworthy. Clearly, the record here shows only the opposite.

The Court's attention is also called to the case of *United States v. Gomez-Lemos*, 939 F.3d 326 (6th Cir. 1991). In that case, two government witnesses who had testified before the grand jury refused to testify at trial, claiming privilege against self-incrimination. The Court in that case wrote that there was a basic untrusthworthiness in the grand jury testimony of witnesses who had been given a plea agreement and immunity by the government which would certainly be motivation to lie.

It should also be pointed out that a certain degree of untrustworthiness is inherent in the grand jury process itself. While witnesses are under oath, there is of course no cross-examination or adversary testing of any kind. For this reason, a trial jury should only be exposed to particularly reliable grand jury testimony. *See United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989).

In sum, it is Appellant's position that prior grand jury testimony is not automatically admissible under *Nance*. Instead, indicia of reliability are required. Here, the grand jury testimony was tainted by offers of immunity, drug

usage, and pressure brought to bear against witnesses. Under these circumstances, the trial court should at the very least have made a determination of reliability prior to admitting the evidence as substantive proof. Alteratively, and better, the court should have excluded the evidence in accordance with the defense objections. The court's failure to do so was prejudicial error.

* * *

APPENDIX B

[Excerpt from Appellant's Petition for Writ of Certiorari to the Court of Appeals of Maryland, *Stephen Daniel Edwards v. State of Maryland*, Petition Docket No. 646 (filed January 8, 1996).].

* * *

inconsistent ...." Both the Mackell and Sheppard cases indicate that under the circumstances as presented to them, the jury should have heard all of the statements including the testimony at the first trial and then determined from them where the truth lay rather than just that testimony that the State sought to elicit. It was wrong, based upon judicial economy, to deny the Petitioner the right to show prior consistent statements under oath to the jury. This was prejudicial error.

II. DID THE TRIAL COURT COMMIT ERROR BY ADMITTING INTO EVIDENCE UNRELIABLE GRAND JURY TESTIMONY OF KEY PROSECUTION WITNESSES AS SUBSTANTIVE EVIDENCE WITHOUT AT LEAST INQUIRING AS TO THE RELIABILITY OF SAID GRAND JURY TESTIMONY BEFORE ITS ADMISSION?

In considering this issue, the Court must also make a determination as to when a declarant is or is not available at the trial. The Court's attention is called to the case of

United States vs. Gomez-Lemos, 939 F.2d 326. In that case, the two government witnesses who testified before the Grand Jury refused to testify at trial by claiming their privilege against self-incrimination. Is this not the same as, if not similar to, a witness who is put on the witness stand and instead of refusing to testify because of self-incrimination claims he never testified truthfully before the Grand Jury in the first place? Or has no recollection of ever testifying? The federal court in the above case specifically held that there was a basic untrustworthiness in the Grand Jury testimony of witnesses who have been given a plea agreement and immunity by the government (which would certainly be a motivation to lie). Is this not the same as Pierre Wilson's testimony? It is respectfully suggested that Grand Jury testimony should be judged under the admissibility requirements applicable in the residual exception to the hearsay rule. Although the witnesses at issue in the instant case were present at trial for cross-examination, all but one recanted the Grand Jury testimony which was then brought in as substantive evidence and the opportunity for cross-examination on that testimony was lost. By analyzing the Grand Jury testimony under the prior exception, the Court should examine the totality of circumstances surrounding the testimony which in this case showed a strong indicia of untrustworthiness. How can the trial court allow the same Grand Jury testimony to be given three times to the trial jury verbatim while excluding prior consistent testimony given under oath on the grounds of judicial economy?

There is an inherent requirement that Grand Jury testimony, as well as signed statements, must bear sufficient indicia of trustworthiness to justify their admission. The new Maryland Rules of Evidence outlines

the residual exception to the ban on hearsay as allowing statements with "circumstantial guarantees of trustworthiness" equivalent to the specific hearsay exceptions. The implication is that it must be shown in all cases where hearsay is admitted. "The oath taken by the Declarant is the only attribute possessed by Grand Jury testimony, as a class of information, that could raise its trustworthiness above the level of ordinary inadmissible hearsay ... Only extraordinary trustworthy Grand Jury testimony could possibly be admissible as truth in the matter asserted." The United States vs. Fernandez, 829 F.2d 976 (11th Cir. 1989). Although it is true that Fernandez dealt with the admissibility of Grand Jury testimony when the Declarant was unavailable, it provides an example of circumstantial evidence of reliability to be used by courts in allowing such testimony under either case.

* * *

Supreme Court, U.S.
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No. 96-245

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STEPHEN DANIEL EDWARDS,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1996

No. 96-245

STEPHEN DANIEL EDWARDS,

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STATE OF MARYLAND,

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On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

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REPLY BRIEF FOR PETITIONER

As we showed in our petition, this case presents important questions of federal constitutional law that this Court expressly left open in *California v. Green*, 399 U.S. 149 (1970), and upon which there is a clear conflict among the state and federal courts. As we also showed, this case—involving a 16-year-old petitioner convicted of murder on the basis of uncorroborated, prior inconsistent statements recanted at trial—presents compelling circumstances for resolving this longstanding conflict.

Significantly, in its brief opposing certiorari the State does not dispute that the Due Process questions raised in the petition are important ones meriting this Court's review. Neither does it deny that the lower courts are divided on the questions. The State furthermore does not dispute that the present case is a particularly persuasive one for resolving the questions, involving, as it does, a murder conviction and life sentence resulting

solely from uncorroborated out-of-court statements of youths who were pressured to make those statements.

Instead, the State opposes review by arguing that the Due Process issues presented were not sufficiently presented below and, in any event, were not expressly left open in *Green*. The State argues, in addition, that many of the conflicting lower court decisions addressing those questions do not involve grand jury testimony.

As we will show, the State's contentions are all either wrong or irrelevant. The questions presented *were* presented to, and decided by, the Maryland courts. They *were* left open in *Green*, and even if they were not, it is undisputed that they are important questions now dividing the lower courts. Furthermore, the fact that not all of the lower court cases involve prior grand jury testimony is irrelevant to the Due Process questions presented. And finally, it is indisputable that the present case is a compelling one for resolving those questions. The petition should be granted.

I. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

The State contends that the Court should not consider the important issues raised by the petition because they allegedly were not presented to or decided by the Maryland courts. As a related point, the State also contends that the lower court decided this case solely on independent state-law grounds. Neither of these contentions is correct.

1. The State concedes, as it must, that petitioner squarely presented the trial court with the argument that the Due Process Clause of the federal Constitution barred a conviction in this case in light of the unreliability of the prior inconsistent statements upon which the

State's case was based. *See* Opp. at 8-9.[1] Indeed, not only did petitioner raise this argument at trial, but he expressly renewed the argument in his written post-trial motion for a new trial. *See* Memorandum of Law and Argument in Support of Motion for New Trial at 12 (arguing that "[t]he admission of recanted Grand Jury testimony and signed statements, accompanied by abundant indicia of unreliability, violated Defendant's rights to due process of law") (Dec. 27, 1994).

Contrary to the State's contentions, petitioner also renewed this argument at the appellate level, and the Maryland Court of Special Appeals (the only appellate court to have ruled on petitioner's appeal) expressly decided the issue *on due process grounds*. As the State notes, petitioner's appeals in the Maryland courts focused on the then-recent decision in *Nance* v. *State*, 629 A.2d 633 (Md. 1993). But the State fails to mention that *Nance* itself constitutes the Maryland Court of Appeals' application of the federal Due Process Clause to the use of prior inconsistent statements as substantive evidence.

Indeed, in rejecting petitioner's due process arguments, the trial judge in this case—who was himself the author of the *Nance* opinion—stated that:

> On the first aspect of your motion, that is that the statements offend due process and the constitutional guarantee of confrontation, I think those concerns were addressed in *Nance* and *Hardy*. *Nance* and *Hardy*, and subsequently [Maryland Rule of

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[1] The trial transcripts make this abundantly clear. *See* Tr. 6-7, 8, Nov. 29, 1994 (counsel's contention that use of coerced grand jury testimony amounts to a "star-chamber" proceeding that would be "a violation of due process of law"); *id.* at 11-12 (counsel's contention that it "has got to be a violation of due process" when the State calls a witness it knows will recant merely in order to use prior grand jury testimony as substantive evidence). The trial court likewise considered and decided the due process claim. *Id.* at 21, 22.

> Evidence] 5-802.1 . . . have established criteria for the substantive use of prior inconsistent statements by a witness.
>
> The protections that were incorporated in *Nance* and *Hardy* and in the Rule of Evidence *were intended to give force and effect to the constitutional guarantees*.

Tr. 21, Nov. 29, 1994 (McAuliffe, J.) (emphasis supplied).[2] Judge McAuliffe's recollection is plainly borne out by his opinion in *Nance*, which established minimal conditions for the use of inconsistent, out-of-court testimony as substantive evidence and held that "[w]hen all of these conditions have been met, *due process of law is satisfied*." 629 A.2d at 644 (emphasis supplied).

Petitioner unquestionably presented the same argument to the Maryland courts that he now presents to this Court—that his conviction must be reversed in light of the unreliability of the prior inconsistent statements upon which that conviction was based.[3] To preserve a constitutional issue for this Court,

> "[n]o particular words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

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[2] *Hardy* was a companion case to *Nance* decided in the same appeal.

[3] *See* Brief of Appellant at 17-21, *Edwards* v. *State*, No. 99 (Md. Ct. Spec. App. Nov. 24, 1995) (Opp. App. 1a-5a); Petition for Writ of Certiorari at 11-13, *Edwards* v. *State*, Docket No. 646 (Md. Jan. 8, 1996) (Opp. App. 6a-8a).

Street v. *New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)).

This standard was plainly satisfied here. Because *Nance* itself rested on an interpretation of the Due Process Clause, petitioner's invocation of *Nance* before the Maryland appellate courts is fairly understood as an invocation of his federal constitutional rights. *See also* Brief of Appellant at 17, *Edwards* v. *State*, No. 99 (Md. Ct. Spec. App. Nov. 24, 1995) (noting that "the Court of Appeals in *Nance* based its analysis of the admissibility of grand jury testimony upon federal law") (Opp. App. 1a).

There is no question, moreover, that the Court of Special Appeals expressly reviewed and decided petitioner's appeal *on due process grounds*. In rejecting petitioner's contention, the Court quoted from and relied on the Court of Appeals' holding in *Nance* that so long as the minimal requirements of that case are met, "'due process of law is satisfied.'" Pet. App. 12a (quoting *Nance*, 629 A.2d at 644). That holding alone is sufficient to preserve the issue for this Court's review, for it is an "'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question *was actually considered and decided.*'" *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134 (1914)) (emphasis supplied).[4] For all these reasons, the Due Process questions raised in the petition are properly before the Court.

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[4] *See also Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972); *Hill* v. *California*, 401 U.S. 797, 805 (1971); *Raley* v. *Ohio*, 360 U.S. 423, 436-37 (1959); *Whitney* v. *California*, 274 U.S. 357, 361-62 (1927), *overruled on other grounds*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

2. For these same reasons, the Court should also reject the State's contention that the rulings below rest solely on "independent and adequate" state law grounds. *See* Opp. at 11-12. Petitioner contends that the protections afforded him by the Maryland courts in this case fall short of the guarantees provided him under the Due Process Clause of the federal constitution. The Maryland courts' substantive rejection of this federal claim cannot be insulated from this Court's review merely because the courts relied in part on a state rule of evidence in reaching that result. *See, e.g., Hathorn* v. *Lovorn*, 457 U.S. 255, 264-65 (1982) (state court's substantive rejection of federal claim is not an independent and adequate state law ground).

II. THE QUESTIONS PRESENTED ARE IMPORTANT ONES THAT DIVIDE THE LOWER COURTS

It is not surprising that the State devotes most of its brief to arguing that the questions presented are not properly before the Court, for the State cannot refute that these are substantial questions worthy of this Court's review. When it finally addresses the merits of the petition, the State argues (1) that this Court did not leave open any due process issues in *Green*; and (2) that the lower-court conflict on the questions presented does not involve solely grand-jury statements. The first point is wrong, but even if correct, it would not alter the importance of the questions or the lower-court conflict over them. The second point is correct, but irrelevant. The important point is that the lower courts are completely divided over the Due Process requirements affecting the substantive use of uncorroborated, prior inconsistent statements in criminal proceedings.

1. The State asserts that the Court in *Green* "in no way 'left open' due process questions regarding the use of all prior inconsistent statements . . . ." Opp. at 14-15. Even the most cursory reading of this Court's opinion belies that contention. Although in *Green* the Court

rejected the defendant's Confrontation Clause argument, the Court nevertheless expressly noted that "considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking. . . ." *Green*, 399 U.S. at 164 n.15 (citing *Thompson* v. *Louisville*, 362 U.S. 199 (1960)).

The State contends that this language, which clearly leaves open a due process challenge to the use of prior inconsistent statements as substantive evidence, in fact forecloses such a challenge except where the declarant is unavailable to testify at trial. *See* Opp. at 14-15. That is simply not the case. The Court's statement was made in the context of distinguishing an earlier case, *Bridges* v. *Wixon*, 326 U.S. 135 (1945), which had held that the use of such evidence raised constitutional concerns. In *Bridges*, however, the declarant *was* available to testify, belying the State's present contention that the issue left open in *Green* applies only to absent declarants.

Even more importantly, lower courts applying *Green* have not agreed with the State's present interpretation. As a result, whether or not *Green* left open the question of Due Process limitations on the substantive use of prior inconsistent statements, the lower courts have treated that question as open and are now in conflict on the answer to the question. *See Vogel* v. *Percy*, 691 F.2d 843, 846-47 (7th Cir. 1982) (applying due process analysis left open in *Green* to case involving available declarant); *United States* v. *Orrico*, 599 F.2d 113, 118-19 (6th Cir. 1979) (applying *Green*'s "strong hint" that prior inconsistent statements are insufficient to sustain conviction to case involving available declarant). Moreover, as noted in our petition, *Vogel* and *Orrico* are themselves the basis for numerous, divergent state court rulings on the same issue. *See* Pet. at 18-22. We believe that these courts correctly interpreted *Green* as leaving open the due process issue in circumstances involving available declarants. But even if, as the State contends,

it is debatable whether all of these courts have wrongly interpreted *Green*, this merely presents further reason to grant the petition to resolve that issue.[5]

2. The State likewise fails to rebut our contention that the state and lower federal courts are in conflict over the questions presented. It first contends that the Federal Rules of Evidence and some analogous state rules authorize the admission of prior inconsistent grand jury testimony as substantive evidence. *See* Opp. at 16-17. But that is entirely beside the point. As this Court made clear in *Green*, the scope of evidentiary rules cannot dictate the scope of the federal Constitution. *See Green*, 399 U.S. at 155-56.

The State's attempt to dispel the existence of a conflict on the questions presented essentially rests on its assertion that only two of the cases relied on in our petition involved grand jury testimony. But that is irrelevant. Neither this Court in *Green* nor any of the cases cited in the petition drew any distinction between grand jury testimony and other statements. The rulings in these cases applied to *all* prior inconsistent testimony, and the rulings are hopelessly in conflict. *See* Pet. at 17-22. The State does not, and cannot, refute that central fact.[6]

---

[5] The State contends in passing that "due process concerns were dispensed with by then Chief Justice Burger" in his concurring opinion in *Green*. Opp. at 15 n.5. In fact, the Chief Justice was merely noting that the federal Constitution does not necessarily follow traditional hearsay rules. *See Green*, 399 U.S. at 171-72 (Burger, C.J., concurring). But even if he would have "dispensed" with due process challenges entirely, his views alone would not have resolved the issue for the Court and would not alter the conflict that now exists in the lower courts over the issue. It should also be noted that, contrary to the State's implications (*see* Opp. at 15 n.5), Justice Harlan's concurring opinion in *Green* expressly left open the possibility of a due process violation on the facts of that case. *See Green*, 399 U.S. at 189 (Harlan, J., concurring).

[6] It should be noted, furthermore, that the prior inconsistent statements at issue here are not comprised solely of grand jury testi-

[Footnote continued]

Finally, the State wrongly implies that the Maryland courts in fact conducted an independent examination of reliability in this case. *See* Opp. at 22. Yet as the State itself concedes, under the rule applied in this case convictions may be predicated on prior inconsistent statements without *any* independent examination of the reliability of the statements or the circumstances under which they were made, and without *any* corroboration whatever. *Id.* As we have shown, while a small minority of courts follow that approach, others hold that such convictions are impermissible *per se*, and still others require an independent examination of reliability before a conviction can be upheld. There is thus a clear, persistent conflict among the lower courts on the questions presented by this petition.

III. THE PRESENT CASE IS A COMPELLING ONE FOR RESOLVING THE IMPORTANT QUESTIONS PRESENTED

As we explained in the petition, this case—in which a sixteen-year-old boy was convicted and sentenced to life in prison on the basis of recanted out-of-court statements of dubious reliability—plainly presents compelling circumstances for resolving the conflict among the lower courts over the questions presented. In its opposition, the State fails to refute this point.

Specifically, the State does not dispute that this case rests *entirely* on uncorroborated extrajudicial statements from teenage boys regarding petitioner's alleged admis-

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[Footnote continued]

mony. Rather, the trial court also admitted as substantive evidence two unsworn statements allegedly made by Pierre Wilson. *See* Pet. at 6. These were held admissible under *Nance*, because they were signed writings. *See Nance*, 629 A.2d at 643. They would not have been admissible, however, under Fed. R. Evid. 801(d)(1)(A), because they were not "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

sions of guilt. Indeed, in its own recitation of the evidence, the State points to *no* evidence of guilt other than these statements. *See* Opp. at 3-6. Nor does the State dispute that these extrajudicial statements were obtained through pressure tactics that even the trial judge found to be questionable. And the State concedes that the vast majority of the statements were expressly recanted at trial. Finally, the State does not dispute that where, as here, a conviction rests upon alleged extrajudicial statements of guilt by the defendant, that conviction cannot be upheld without further corroborating evidence, which was absent from this case. *See Opper* v. *United States*, 348 U.S. 84, 89 (1954).

These undisputed facts, we submit, squarely present the questions this Court left unresolved in *Green*, and present compelling circumstances for resolving the conflict among the lower courts on the resolution of those questions.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the petition should be granted.

Respectfully submitted,

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